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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 177.

THE TOWN OF BROOKLYN, PLAINTIFF IN ERROR,

vs.

THE ÆTNA LIFE INSURANCE COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 2, 1878.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms in the city of Chicago, in the district aforesaid, before the judges thereof, on Monday the thirteenth day of March, in the year of our Lord one thousand eight hundred and seventy-six, and of our Independence the one hundredth year.

WILLIAM H. BRADLEY, *Clerk.*

ÆTNA LIFE INSURANCE COMPANY
vs.
THE TOWN OF BROOKLYN. } Assumpsit.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the nineteenth day of June, A. D. 1875, came said plaintiff, by J. H. Roberts, with Messrs. Cullom, Scholes and Mather, its attorneys, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in the district aforesaid, its bond for costs and præcipe for a writ of summons against said defendant, and at the same time
2 filed its declaration in said-entitled cause, which said bond, præcipe, and declaration are respectively in the words and figures following, to wit:

Bond for costs.

Circuit court United States of America, northern district of Illinois.
July term, A. D. 1875, ss:

ÆTNA LIFE INSURANCE COMPANY
vs.
TOWN OF BROOKLYN. } In assumpsit. Damages, $7,000.

We do hereby enter ourselves security for costs in this cause, and acknowledge ourselves bound to pay or cause to be paid all costs which may accrue in this action, either to the opposite party or to any of the officers of this court, in pursuance of the laws of this State and of the United States.

Dated this 17th day of June, 1875.

T. C. MATHER.
SAM'L D. SCHOLES.

(Endorsed:) Filed June 19th, A. D. 1875. W'm H. Bradley, clerk.

Præcipe.

Circuit court United States of America, northern district of Illinois.
July term, A. D. 1875, ss:

ÆTNA LIFE INSURANCE COMPANY
vs.
THE TOWN OF BROOKLYN. } In assumpsit. Damages, $7,000.00.

The clerk will issue summons in the above-entitled cause, di-
3 rected to the marshal of said district, returnable as above.

CULLOM, SCHOLES AND MATHER,
Plaintiff's Attorney.

SPRINGFIELD, *June* 17, 1875.

(Endorsed:) Filed June 19th, A. D. 1875. W'm H. Bradley, clerk.

Declaration.

UNITED OF AMERICA.
Northern District of Illinois:

In circuit court, July term, A. D. 1875.

The Ætna Life Insurance Company, a corporation organized and existing under the laws of the State of Connecticut, plaintiff, by Cullom, Scholes and Mather and Ja's H. Boberts, its attorneys, complains of the Town of Brooklyn, a corporation existing under the laws of the State of Illinois, and situate in the northern district thereof, defendant, of a plea of trespass on the case on promises, for that whereas heretofore, to wit, on the first day of July, A. D. eighteen hundred and seventy-two, at, to wit, said northern district, said defendant made its fifty interest coupons in writing, which are fac-similes of each other, except as to the numbers thereon, they being, respectively, as follows: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, and 50.

4 And plaintiff avers that the following is a true copy of said No. 1:

$100] INTEREST WARRANT. [No. 1.

Town of Brooklyn.

The Town of Brooklyn, State of Illinois, will pay to the bearer, on the first day of July, A. D. 1874, one hundred dollars, at the office of the treasurer of Lee County, being one year's interest on the bond numbered above.

W. J. GUFFIN,
Supervisor.
JAMES W. SWISHER,
Town Clerk.

(On the face in red:) 3.

And plaintiff avers that at said district, on, to wit, said first day of July, A. D. 1872, said coupons were duly delivered and then and there came to the possession of plaintiff, as owner and bearer thereof, whereby defendant then and there became liable to pay plaintiff, as the owner and bearer thereof, the sum of money in said coupons mentioned, according to their tenor and effect, and then and there, in consideration of the premises, faithfully promised and undertook to pay plaintiff, as such owner and bearer thereof, said sums of money in said coupons mentioned, according to their tenor and effect.

And whereas said defendant afterwards, to wit, on the first day of June, A. D. 1875, at, to wit, said northern district, became and still is indebted to plaintiff in the sum of five thousand dollars, for so much money before that time paid, laid out, and expended by the plaintiff for the use of the defendant and at its request. And in the further sum of five thousand dollars, for so much money before that time ...ent and accommodated by plaintiff to defendant at its request. ... further sum of five thousand dollars, for so much money be... had and received by the defendant, to the use of the ...n the further sum of five thousand dollars, for so much ... due from the defendant to the plaintiff on an ac-

count then and there stated between them. And in the further sum of five thousand dollars, for so much money before that time due from the defendant to the plaintiff for interest upon and for the forbearance of divers large sums of money before then due from the defendant to the plaintiff and by the plaintiff forborne to the defendant for long spaces of time before then elapsed, at the request of defendant, whereby the defendant became liable to pay the plaintiff the said several sums of money when it should be requested. And the defendant afterward, on, to wit, said first day of June, A. D. 1875, at, to wit, said northern district, in consideration of the premises, then and there promised to pay the said several sums of money to the plaintiff on request; yet the defendant has not, though often requested, paid said several sums of money in the above counts mentioned, or any part thereof, to the damage of plaintiff the sum of seven thousand dollars.

Wherefore plaintiff brings suit, &c., by

6 JA'S H. ROBERTS AND
CULLOM, SCHOLES AND MATHER,
Its Attorneys.

Copy of a/c sued on.

The town of Brooklyn to Ætna Life Ins. Co., D'r.

To money paid, laid out, and expended		$5,000 00
" " lent and accommodated		$5,000 00
" " had and received		$5,000 00
" " on a/c stated		$5,000 00
" " due for interest		$5,000 00

(Endorsed:) Filed June 19, 1875. W'm H. Bradley, cl'k.

And on the same day, to wit, the 19th day of June, A. D. 1875, a writ of summons issued out of said clerk's office against said defendant, which said writ, together with the return of the marshal annexed thereto, is in the words and figures following, to wit:

Writ of summons.

Circuit court of the United States of America, northern district of Illinois, ss.

The United States of America to the marshal of the northern district of Illinois, greeting:

We command you to summon the town of Brooklyn, if found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois on the first day
7 of the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of July next, to answer unto Ætna Life Insurance Company of a plea of trespass on the case upon promises, to its damage, as it alleges, of seven thousand dollars, and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 19th day of June, in the year of our Lord one thousand eight hundred and seventy-five, and of our Independence the 99th year.

[SEAL.] W'M H. BRADLEY,
Clerk.

Special deputy's return.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Know all men by these presents, that I have appointed, and, by these presents, do appoint Thomas Forristall my true and lawful deputy to execute the annexed writ Ætna Life Insurance Co. vs. The Town of Brooklyn, and to make return of the execution thereof according to law.

[SEAL.] B. H. CAMPBELL,
United States Marshal for the Northern District of Illinois.

8 I have served the annexed writ in the following manner, to wit: Upon the town of Brooklyn, therein named, on the 23 day of June, A. D. 1875, by delivering a true copy thereof to Daniel Millar, supervisor of said town of Brooklyn.

B. H. CAMPBELL,
United States Marshal.
By THO'S FORRISTALL,
Special Deputy.

Thomas Forristall, being duly sworn, deposes and says that he served the annexed writ, as stated in the foregoing return, and that the expense returned by him, in addition to the fees, was actually incurred, and that the same is according to law. Sworn to before me this twenty-third day of June, A. D. 1875.

[NOTARIAL SEAL.] DANIEL T. LOWD,
United States Commissioner for the Northern District of Illinois, or Notary Public, Mendota, La Salle County, Illinois.

(Endorsed:) Filed June 26th, A. D. 1875. W'm H. Bradley, clerk.

Afterwards, to wit, on the 7th day of July, A. D. 1875, said defendant, by its attorneys, filed in said clerk's office its pleas in said entitled cause, which said pleas are in the words and figures following, to wit:

9 *Pleas.*

UNITED STATES OF AMERICA,
Northern District of Illinois:

Circuit court, July term, A. D. 1875.

ÆTNA LIFE INSURANCE COMPANY
vs.
THE TOWN OF BROOKLYN. } Assumpsit.

And the said defendant comes and defends the wrong and injury when, &c., and says it, the said town of Brooklyn, did not undertake and promise in manner and form, as the said plaintiff hath declared, against the said town in its declaration, and of this the said town puts itself upon the country.

PETERS, ECKEL AND KYLE,
Att'ys for Def't.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Daniel Miller, being duly sworn, says he is the supervisor of the said town of Brooklyn, and is the agent of said town to attend to the defence of this suit, and he verily believes that said town has a good defence to said suit upon the merits to the whole of the plaintiff's demand.

This affiant further says that the interest coupons sued and declared upon in plaintiff's declaration, and the purported bonds to which they were attached, were issued and delivered without the authority of
10 the said town of Brooklyn, and that the said purported bonds and coupons are not the paper of said town; that the said town never executed the same or authorized the execution thereof, and that the plea aforesaid is true in substance and in fact.

DANIEL MILLER.

Sworn to and subscribed before me this 2nd of July, A. D. 1875, as witness my hand and notarial seal.

[SEAL.] JONATHAN N. HILLS,
Notary Public.

2nd. And for a further plea in this behalf the said defendant says actio non, because it says that the several causes of action in the said several counts of said declaration are for one and the same thing to wit, for the said interest coupons in the first count of said declaration mentioned; and that interest-coupons and the purported bonds to which they were attached, were issued and delivered by the supervisor and town clerk of said town to pay for certain stock claimed to have been subscribed by said town to the Chicago and Rock River Railroad Company, a corporation of the State of Illinois, organized under and by virtue of a certain act of the general assembly of the State of Illinois, entitled "An act to incorporate the Chicago and Rock River Railroad Company," approved March 24th, A. D. 1869, and thereby au-
11 thorized and empowered to locate, construct, and complete a railroad with a single or double track from a point on the south side of Rock River at or near a place opposite Sterling, running eastwardly or south of east, crossing the Illinois Central Railroad at the city of Amboy. Thence in a southerly direction intersecting the Chicago and Rock Island Railroad or the Chicago and Burlington Railroad in Bureau County, Illinois; also running from the city of Amboy in an easterly direction over the most eligible section, crossing the Chicago and Burlington Railroad at or near Somonauk, at or near Aurora, or at some point between those points, thence easterly to intersect the Chicago branch of the Illinois Central Railroad outside of the corporation of the city of Chicago.

After said company was so incorporated the defendant avers that the said railroad company, in order to induce the legal voters of said town of Brooklyn to vote a subscription to the capital stock of said company, by its officers and agents pretended to lay out said line of railroad through said town of Brooklyn and near the village of Malugius Grove, therein through to its eastern terminus on the Chicago branch of the Illinois Central Railroad, in accordance with the provisions of said act, and pretended and gave out that said company was about to con-
12 struct and complete its said railroad and thereby establish and complete a through line to Chicago aforesaid, which should be wholly independent of and a competing line with the Chicago, Burling-

ton and Quincy Railroad, which runs to the said city of Chicago and passes said town of Brooklyn a few miles south thereof, said town of Brooklyn being situate southeasterly of said city of Amboy, and northwesterly from the town of Somonauk and city of Aurora.

Defendant further represents that the 20th day of September, A. D. 1869, an election was held in the town of Brooklyn aforesaid, to determine whether said town would vote a subscription of fifty thousand dollars to the stock of said railroad company. That the notices given for said election stated expressly that should the vote of said town be in favor of said subscription none of the bonds in payment for such stock should be issued, or draw interest, or be delivered to said railroad company except as follows: When said railroad should be completed, and cars running thereon through said town of Brooklyn, then said bonds to be issued and delivered to said railroad company upon such express terms and not otherwise; and a majority of the voters of said town at such election voted to make such subscription to the capital stock of said company. That afterwards, on the 23d day of May, A. D. 1870,

13 John Holdren, who was then the acting supervisor of said town of Brooklyn, as such supervisor, executed and signed a certain paper purporting to subscribe in the name of said town fifty thousand dollars to the capital stock of said railroad company, which said subscription expressly provided that such subscription was made upon the express understanding as provided in the notices of election; that no payment is to be made until the road is completed, and cars running through said town of Brooklyn; that this subscription to be paid to said company in the bonds of said township of Brooklyn.

The defendant further avers that the supervisor of said town of Brooklyn had no authority or power to issue any bonds of said town of Brooklyn, or any interest-coupons thereto attached, or otherwise, to said Chicago and Rock River Railroad Company until said railroad had been completed, and said railroad has never been completed.

Yet the supervisor of said town, who was then Washington J. Guffin, having no authority or legal power so to do, on or about the 7th day of November, A. D. 1872, pretended to sign and issue in behalf of said town of Brooklyn, as such supervisor, bonds of said town of Brooklyn to the said Chicago and Rock River Railroad Company to the aggregate amount of fifty thousand dollars, bearing interest at ten per cent. per annum with interest coupons attached, of which the interest cou-

14 pons sued and declared upon in the plaintiff's declaration are a part thereof.

Defendant claims that said bonds and coupons are wholly void and in no wise obligatory upon said town of Brooklyn, for the reason that said railroad company had not at the time said pretended bonds were issued complied with the conditions in said notices of election and subscription to the capital stock specified as conditions precedent to the issuing of said bonds; that the railroad company had not at that time nor has it at any time since completed the railroad of said company, but has left that portion of its said railroad laying between a point in De Kalb County, a short distance east of the east line of Lee County and the said Chicago branch of the Illinois Central Railroad wholly unbuilt; and has also left that portion of its said railroad extending from the city of Amboy in a southerly direction to intersect the Chicago and Rock Island Railroad or the Chicago and Burlington and Quincy Railroad, in Bureau County, Illinois, wholly unbuilt and uncompleted; and has wholly abandoned the further building and completion of its said railroad.

And the said defendant further avers that immediately after procuring

the said pretended bonds and coupons to be issued, of which the coupons sued and declared upon are a part, the said Chicago and
15 Rock River Railroad Company turned the course of their said railroad, which it was then constructing, to the northeast, and built the same up to Shabbona Station, a point on the Chicago and Iowa Railroad, in De Kalb County, Illinois, and at that point connected the eastern terminus of the said Chicago and Rock River Railroad with the said Chicago and Iowa Railroad, and that portion of said C. and R. R. Railroad so built has been run and operated in connection with and practically as a part of the Chicago, Burlington and Quincy Railroad, so that in fact the said town of Brooklyn failed to obtain any railroad to said Chicago, and failed to obtain a competing railroad thereto with the C., B. and Q. Railroad.

And defendant further avers that just before the issuing said bonds and coupons, of which those sued on are a part, it was rumored in said town of Brooklyn that the Chicago and Rock River Railroad was about to be transferred to the C., B. and Q. Railroad Company, and that the said C. and R. R. Railroad was not to be built and completed as was required by the notices of election and subscription of the town of Brooklyn aforesaid; and thereupon the agents and representatives of the Chicago and Rock River Railroad Company were notified that if the said last-named railroad was not to be built and completed as promised, that the said town of Brooklyn would not issue and deliver the bonds
16 and coupons aforesaid, and thereupon said agents and representatives informed said town of Brooklyn and the citizens thereof that said company had no intention of not completing their said railroad as promised, but that the said company would build the road through the Calumet as fast as men and money could build it; and thereupon, the supervisor and town clerk of said town, relying upon said representations, issued and delivered to the agents and representatives of said company the bonds and coupons aforesaid, of which those sued upon are a part of the coupons, and so soon as the bonds and conpons were delivered the said company utterly ceased to prosecute the construction of said railroad and refused to complete the same and have abandoned the entire work.

Defendant avers that the representations aforesaid of the agents of said company were false and fraudulent, and known to be such by said agents and representatives at the time they made the same; but the falsity thereof was unknown to the said town of Brooklyn and the supervisor and clerk thereof at the time the bonds and coupons aforesaid were issued and delivered, and the issuing and delivery of said bonds and coupons were procured by and through such false and fraudulent representations; and the defendant further avers that the stock of said Chicago and Rock River Railroad Company is worthless and has been so ever since
17 the said company ceased to prosecute the completion of the construction of said railroad and abandoned the same, and the said railroad passed into the hands of the Chicago, Burlington and Quincy Railroad Company, which was immediately after the issuing of the said bonds and coupons aforesaid.

The said Town of Brooklyn claims no interest in the stock of said company; and the said town has received no value whatever for the bonds and coupons aforesaid and the same was procured by fraud, and this the said Town of Brooklyn is ready to verify; wherefore it prays judgment, &c.

3rd. And for a further plea in this behalf the said defendant says actio non, because it, the said Town of Brooklyn, says as it has already

said in said second plea, and it further saith, that the s aid plaintiff is not a bona fide assignee of the interest coupons declare d upon in said declaration before maturity and without notice of the defence set up in said second plea, and this the said defendant is ready to verify; wherefore it prays judgment, when, &c.

4th. And for a further plea in this behalf the said defendant says actio non, because it says that the causes of action in said several counts in plaintiff's declaration are the same, and are not other and different, to wit, the interest coupons declared upon in said first count; and that said
18 interest coupons and the bonds to which they were attached were issued by the supervisor and town clerk of said Town of Brooklyn, and delivered without the authority of the board of auditors or the corporate authorities of said town; and the supervisor of said town who issued and delivered the same, acted therein fraudulently and in collusion with the parties to whom the same were delivered, the said supervisor knowing at the time that he had no such authority, and he having been elected supervisor of said town on the express pledge on his part and with the understanding between him and those who voted for and supported him, that he would not issue and deliver said bonds and coupons until said Chicago and Rock River Railroad was completed its entire length to the Chicago branch of the Illinois Central Railroad.

And the defendant avers that said railroad was never so completed and is not now, and this the said defendant is ready to verify: wherefore it prays judgment, &c.

5th. And for a further plea in this behalf defendant says actio non, because it says the causes of action in all the counts of plaintiff's declaration are the same, to wit, the interest coupons described in the first count, and that the Town of Brooklyn and others heretofore, to wit, on the 14th day of November, A. D. 1873, in the circuit court of Lee County, Illinois, obtained a decree against the Chicago and Rock
19 River Railroad Company, and the assignees and holders of the bonds and coupons purported to have been issued by the said Town of Brooklyn to the said railroad company, of which the interest coupons described in the first count of plaintiff's declaration are a part, and others.

That the said plaintiff was made party defendant in said suit with the other holders and owners of the bonds and coupons issued by said Town of Brooklyn, by the name and description of "the unknown owners of certain bonds and coupons issued by Washington J. Guffin, the supervisor of the Town of Brooklyn, Lee County, Illinois, to the Chicago and Rock River Railroad Company, purporting to be the bonds and coupons of said Town of Brooklyn."

And the defendant avers that the circuit court of Lee County, Illinois, had then and there jurisdiction of the subject matter and the persons of parties defendant therein, by the issuing and return of process and by proof of publication made as required by the statute of the State of Illinois in cases of non-resident defendants; and the said circuit court of Lee County then and there entered a decree in said cause in reference to the bonds and coupons aforesaid, of which the interest coupons declared upon are a part, as follows, to wit: "It is further ordered, adjudged, and decreed, that the said pretended bonds and coupons
20 of the said Town of Brooklyn, so issued to the said Chicago and Rock River Railroad Company, and registered as aforesaid in the office of the auditor of public accounts of Illinois, are void, and in nowise obligatory on the said Town of Brooklyn, and that the same be surrendered up by the parties holding the same to be cancelled," as by

the record and proceedings thereof still remaining in the said court more fully and at large appears, which said decree still remains in full force and effect, not in the least reversed or made void, and this the defendant is ready to verify by the said record wherefore it prays judgment &c.

PETERS ECKEL AND KYLE,
Att'ys for Defendant.

(Endorsed:) Filed July 7, 1875. W'm H. Bradley, cl'k.

Afterwards, to wit, on the 14th day of October, A. D. 1875, said plaintiff, by its attorneys, filed in said clerk's office its joinder and demurrer to the special pleas in said entitled cause, which said joinder and demurrer are respectively in the words and figures following, to wit:

Joinder and demurrer to special pleas.

In the circuit court of the United States, northern district of Illinois.
October term, 1875.

ÆTNA LIFE INS. COMPANY
vs.
21 THE TOWN OF BOOKLYN.

And now comes the said plaintiff, by Cullom, Scholes and Mather, and Ja's H. Roberts, its attorneys, and as to the plea of the said defendant by it first above pleaded, and whereof it has put itself upon the country, does the like, &c.

And the said plaintiff, as to the said pleas of defendant by it secondly, thirdly, fourthly, and fifthly above pleaded, says that the same and each of them, and the matters therein respectively contained are, and each of them is, insufficient in law, and plaintiff here demurs to the said pleas separately for such insufficiency, and this it is ready to verify; wherefore it prays judgment, &c.

CULLOM, SCHOLES AND MATHER, AND
J. H. ROBERTS, *P. Q.*

(Indorsed:) Filed Oct. 14, 1875. W'm H. Bradley, cl'k.

Afterwards, to wit, on the 16th day of October, A. D. 1875, said plaintiff, by its attorneys, filed in said clerk's office its replication to the third plea in said entitled cause, which said replication is in the words and figures following, to wit:

Replication to third plea.

In the circuit court of the United States, northern district of Illinois.

22 ÆTNA LIFE INS. CO.
vs.
THE TOWN OF BROOKLYN. } Replevin.

And now comes the said plaintff, by Cullom, Scholes and Mather, and Ja's H. Roberts, its attorneys, and for replication to the third plea of defendant says that the said plaintiff is a bona fide assignee of said coupons declared upon, and the same were assigned to the plaintiff before the maturity thereof for value, without notice of the defence in said

plea set forth, and of this the said plaintiff puts itself upon the country, &c.

CULLOM, SCHOLES AND MATHER, AND
JA'S H. ROBERTS, *P. Q.*

(Endorsed:) Filed Oct. 16, 1875. W'm H. Bradley, cl'k.

And on the same day, to wit, the 16th day of October, A. D. 1875, in the adjourned October term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

ÆTNA LIFE INSURANCE COMPANY
vs.
TOWN OF BROOKLYN. } Assumpsit.

23 Now comes the parties, by their attorneys, and on motion of the plaintiff, by its attorney, leave is given it to withdraw its demurrer to the third plea, and to reply to said plea. And now comes on to be heard the demurrer of the plaintiff to the second, fourth, and fifth pleas filed herein, and after hearing the arguments of counsel the court sustains said demurrer.

Afterwards, to wit, on the 13th day of March, A. D. 1876, in the adjourned March term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. James C. Hopkins, district judge, is the following entry, to wit:

ÆTNA LIFE INSURANCE COMPANY
v.
THE TOWN OF BROOKLYN. } Assumpsit.

This cause having this day been called for trial, now comes the plaintiff, by its attorney, and moves the court that a jury come to try the issue joined upon the plea herein. It is thereupon considered by the court that a jury come to try said issue, and thereupon come a jury of good and lawful men, to wit, William Shoup, Aaron L. Brown, Robert Strong, John Woodmanse, W. S. Proudfoot, Henry Sherman, John Stanley, Joseph Robinson, P. F. Scanlan, James Herrington, Albert Gillespie, and C. M. Hammond, who were all duly elected, tried, and sworn, well and truly to try said issue, and after hearing the evidence on the part of the plaintiff, and receiving the instructions of the court,
24 the jury returned into court the following verdict, to wit: "We, the jury, find the issue for the plaintiff, and assess its damages to the sum of five thousand five hundred and eleven dollars." It is thereupon considered and adjudged by the court that the plaintiff do have and recover of the defendant the said sum of five thousand five hundred and eleven dollars, its damages so as aforesaid assessed, together with its costs and charges in this behalf expended, amounting to the sum of fifty-six dollars and forty cents.

Afterwards, to wit, on the 16th day of March, A. D. 1876, in the said adjourned March term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. James C. Hopkins, district judge, is the following entry, to wit:

THE ÆTNA LIFE INSURANCE COMPANY
vs.
THE TOWN OF BROOKLYN. } Assumpsit.

Now comes the defendant, by its attorney, and moves the court to set aside the judgment and verdict herein and grant a new trial.

Afterwards, to wit, on the 3rd day of April, A. D. 1876, in the said adjourned March term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. James C. Hopkins, district judge, is the following entry, to wit:

25 ÆTNA LIFE INSURANCE COMPANY
v.
THE TOWN OF BROOKLYN. } Assumpsit.

The motion of the defendant heretofore entered to set aside and vacate the judgment entered herein on the thirteenth day of March, last, and grant a new trial now coming up for hearing, and the defendant and its attorney failing to appear and sustain said motion, the same is overruled and it is ordered that said judgment stand in full force.

Afterwards, to wit, on the 27th day of June, A. D. 1876, said defendant filed in said clerk's office its supersedeas bond in said entitled cause, which said bond, with affidavits attached thereto, is in the words and figures following, to wit:

Supersedeas bond.

Supreme Court of the United States.

THE ÆTNA LIFE-INSURANCE COMPANY
vs.
THE TOWN OF BROOKLYN.

Know all men by these presents that the Town of Brooklyn, Lee County, Illinois, and the undersigned are held and firmly bound unto the Ætna Life-Insurance Company in the sum of five hundred dollars, to be paid to said Ætna Life-Insurance Company its legal representatives, to which payment well and truly to be made, we bind our-
26 selves and each of us jointly and severally, and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals and dated this 30th day of March, A. D. 1876.

Whereas the above-named Town of Brooklyn hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the northern district of Illinois, wherein the Ætna Life-Insurance Company was plaintiff, and the Town of Brooklyn defendant, which judgment was against said defendant:

Now, therefore, the condition of this obligation is such that if the above-named Town of Brooklyn shall prosecute its said writ of error to effect and answer all costs if the said town shall fail to make good its

plea, then this obligation to be void, otherwise the same shall be and remain in full force and virtue.

TOWN OF BROOKLYN, [SEAL.]
Lee County, Ill's.
J. F. COLE, [SEAL.]
Town Clerk.
DANIEL MILLER, [SEAL.]
Supervisor.
A. J. CAMAHAN. [SEAL.]
27 W'M ATKINSON. [SEAL.]
O. P. JOHNSON. [SEAL.]

Sealed and delivered in presence of—
S. W. CAMAHAN.
J. N. HILLS.

Approved June 23, 1876.

J. C. HOPKINS,
Presiding Judge.

STATE OF ILLINOIS,
County of Lee, ss:

A. J. Camahan, being duly sworn, deposes and says that he is a resident of Lee County, State of Illinois, and a householder therein, and is worth the sum of 500.00 dollars over all his just debts and liabilities and exclusive of property exempt by law from execution.

A. J. CAMAHAN.

Subscribed and sworn to before me this 30th day of Mar., A. D. 1876.
[SEAL.] JONATHAN N. HILLS,
Notary Public.

STATE OF ILLINOIS,
County of Lee, ss:

O. P. Johnson, being duly sworn, deposes and says that he is a resident of Lee County, State of Illinois, and a householder therein, and is worth the sum of $500.00 *dollars* over all his just debts and liabilities and exclusive of property exempt by law from execution.

O. P. JOHNSON.

Subscribed and sworn to before me this 30th day of Mar., A. D. 1876.
[SEAL.] JONATHAN N. HILLS,
Notary Public.

28 STATE OF ILLINOIS,
County of Lee, ss:

William Atkinson, being duly sworn, deposes and says that he is a resident of Lee County, State of Illinois, and a householder therein, and is worth the sum of $500.00 *dollars* over all his just debts and liabilities and exclusive of property exempt by law from execution.

WILLIAM ATKINSON.

Subscribed and sworn to before me this 30th day of Mar., A. D. 1876.
[SEAL.] JONATHAN N. HILLS,
Notary Public.

(Endorsed:) Filed June 27, 1876. W'm H. Bradley, cl'k.

29 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for the northern district of Illinois, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court, in the cause wherein Ætna Life Insurance Company is the plaintiff, and Town of Brooklyn is the defendant, as the same appears from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office in Chicago, in said district, this 26th day of September, A. D. 1876, and of our Independence the 101st year.

[SEAL.] W'M H. BRADLEY, *Clerk.*

30 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you in said circuit court, between the Ætna Life Insurance Company, plaintiff, and the Town of Brooklyn, defendant, a manifest error hath happened, to the great damage of the said The Town of Brooklyn, as by its complaint appears, and it is being fit that the error, if any there has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1876, in the Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this third day of April, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States the one hundredth year.

[SEAL.] W'M H. BRADLEY,
Clerk of Circuit Court U. S., Nor. Dist. Ill's.

(Indorsed:) Supreme Court of the United States. The Ætna Life Insurance Company vs. The Town of Brooklyn. Writ of error.

31 STATE OF ILLINOIS,
County of Lee, ss:

Lafayette Carnahem, being duly sworn, deposes and says that he is a resident of Lee County, State of Illinois, and a householder therein, and is worth the sum of $500.00 dollars over all his just debts and liabilities and exclusive of property exempt by law from execution.

LAFAYETTE CARNAHEM.

Subscribed and sworn to before me this 30th day of Mar., A. D. 1876.

[SEAL.] JONATHAN N. HILLS,
Notary Public.

32 STATE OF ILLINOIS,
County of , ss:

David Holdren, being duly sworn, deposes and says that he is a resident of Lee County, State of Illinois, and a householder therein, and is worth the sum of $500.00 dollars over all his just debts and liabilities and exclusive of property exempt by law from execution.

DAVID HOLDREN.

Subscribed and sworn to before me this 30th day of Mar., A. D. 1876.
[SEAL.] JONATHAN N. HILLS,
Notary Public.

33 STATE OF ILLINOIS,
County of La Salle, ss:

Reuben N. Woods, being duly sworn, deposes and says that he is a resident of Lee County, State of Illinois, and a householder therein, and is worth the sum of $500.00 dollars over all his just debts and liabilities and exclusive of property exempt by law from execution.

REUBEN N. WOODS.

STATE OF ILLINOIS,
La Salle County:

Subscribed and sworn to before me this 30th day of Mar., A. D. 1876.
[SEAL.] DANIEL Y. LOWD,
Notary Public.

34 *Assignment of errors.*

United States of America, Supreme Court thereof, October term, A. D. 1876.

TOWN OF BROOKLYN, PLAINTIFF IN ERROR,
vs.
ÆTNA LIFE-INSURANCE COMPANY, DEFENDANT in error.

Error to the circuit court, northern district of Illinois.

And now comes the said plaintiff in error and says in the record and proceedings aforesaid there is manifest error, in this, to wit:

1st. That the said circuit court erred in sustaining demurrer to defendant's 2d plea filed by appellant in circuit court, the said 2d plea being good and sufficient.

2d. That the said circuit court erred in sustaining demurrer to defendant's 4th & 5th pleas, and each of said fourth & fifth pleas, both of said pleas having been filed by pl't'ff in error, who was the def't in the circuit court, and the same being each good and sufficient.

3d. Said circuit court erred in rendering judgment in favor of the def't in error and against the plaintiff in error, by reason whereof the plaintiff in error prays that the said judgment may be reversed.

MILTON T. PETERS &
THOMAS J. HENDERSON,
Att'ys for Plaintiff in Error.

(Indorsed:) Town of Brooklyn vs. Ætna Life-Ins. Co. Assignment of errors.

35 UNITED STATES OF AMERICA, *ss:*

To the Ætna Life Insurance Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the 9th day of October next, pursuant to a writ of error filed in the clerk's office of the circuit court for the northern district of Illinois, wherein The Town of Brooklyn, Lee County, Illinois, is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

36 Witness the honorable Morrison R. Waite, Chief Justice of said Supreme Court of the United States, this 23 day of June, in the year of our Lord one thousand eight hundred and seventy-six.

J. C. HOPKINS,
Presiding Judge.

Received copy of above citation June 27, 1876.
GOOKINS & ROBERTS, *Att'ys,*

(Indorsed:) 619. Ætna Life Ins. Co. vs. Town of Brooklyn. Citation.

(Indorsement on cover:) No. 177. The Town of Brooklyn, plaintiff in error, vs. The Ætna Life Insurance Company. N. Illinois C. C. U. S. Filed 2 October, 1876.

Supreme Court of the United States,

OCTOBER TERM, A. D. 1878.

No. 777.

THE TOWN OF BROOKLYN, *Plaintiff in Error*,

vs.

THE ÆTNA LIFE INSURANCE COMPANY,

Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

ABSTRACT, ASSIGNMENT OF ERRORS, POINTS AND AUTHORITIES, FOR PLAINTIFF IN ERROR.

MILTON T. PETERS & THOS. J. HENDERSON,

Attorneys for Plaintiff in Error.

Filed *October, A. D. 1878*

Clerk U. S. Supreme Court.

Supreme Court of United States of America.

OCTOBER TERM, A. D. 1878.

THE TOWN OF BROOKLYN,
Plaintiff in Error,
vs.
THE ÆTNA LIFE INSURANCE COMPANY.

Error to Circuit Court of United States for the Northern District of Illinois.

Abstract, Assignment of Errors, Points and Authorities, for Plaintiff in Error.

The defendant in error, on the 19th June, A. D. 1875, brought suit in the Circuit Court of the United States, for the Northern District of Illinois, against the plaintiff in error.

2 Printed Record, pages 2 and 3.

On same day filed declaration, of one special count, and common counts.

Special count, declares on fifty interest coupons, alleged to be fac similes, except as to numbers.

Copy of No. 1, given, as follows, to wit.:

"$100. Interest warrant. (No. 1.)
"Town of Brooklyn.

"The town of Brooklyn, State of Illinois, will pay to the "bearer, on the first day of July, A. D. 1874, one hundred dollars, "at the office of the treasurer of Lee County, being one year's "interest, on the bond numbered above.

"W. J. Guffin,
Supervisor.
"James W. Swisher,
"Town Clerk."

"(on the face in red) 3.

Plaintiff (the deft. in error), alleges, that on the 1st July, 1872, said coupons were duly delivered, and then and there, came, to plaintiff's possession, as owner and bearer, &c.

3

Common Counts in the ordinary form, for money laid out, interest for bonds, &c.

No allegation in the declaration, of the bonds or their contents, and no copy. No allusion to any law, authorizing the issue of either bonds or coupons: or any averment, as to their consideration: or authority for their issue.

Printed record pages 4, 5, 6, 7, 8.

Defendant, (plaintiff in error) filed five pleas.

4

General issue, and four special pleas:

5

with affidavit of Daniel Miller, supervisor of the town of Brooklyn, that he was the agent of the town to attend the defence of the suit, and he believed that the town had a good and meritorious defence: Further said, that the interest coupons and bonds were issued and delivered, without authority of the town. That they were not the paper of the town. That the town had never executed them, or authorized their execution.

General issue is in the usual form.

2d Plea alleged that the causes of action in all the counts are the same, the interest coupons. That such interest coupons, and the bonds to which they were attached, were issued and delivered, by the supervisor and town clerk, to pay for stock, claimed to have been subscribed, by the town, to the Chicago and Rock River Railroad Company, a corporation of the State of Illinois, organized under, and by virtue of an act of the legislature of that state, entitled "An act to incorporate the Chicago and Rock River Railroad Company, approved March 24th, A.D. 1869, and was thereby authorized and empowered, to locate, construct and complete a railroad, with a single or double track, from a point, on the south side of Rock River, at, or near a place, opposite Sterling, running eastwardly, or south of east, crossing the Illinois Central Railroad, at the City of Amboy. Thence in a southerly direction, intersecting the Chicago and Rock Island Railroad, or the Chicago and Burlington Railroad, in Bureau County. Also running from the City of Amboy, in an easterly direction, over the most eligible section, crossing the Chicago and Burlington Railroad, at or near Somonauk, at or near Aurora, or at some point between those points, thence easterly to intersect the Chicago branch of the Illinois Central Railroad, *outside of the corporation of Chicago.*" Said plea alleges; that after said company was incorporated, the Railroad Company to induce the legal voters of Brooklyn, to vote a sub-

scription, to the capital stock of said company, pretended to lay out the line of their contemplated road, through the town of Brooklyn, and near the village of Malugius Grove, through to the eastern terminus, on the Chicago branch of the Illinois Central Railroad, according to their charter. That the Company pretended and gave out, that it was about to construct and complete, a *through line to Chicago*, which should be an independent and competing line, with the Chicago, Burlington & Quincy Railroad, which run to the City of Chicago, passing a few miles south of the town. Brooklyn being south easterly of the city of Amboy, and north westerly from Somonauk, and the city of Aurora.

6.

Plea further alleges, that on the 20th September, A. D. 1869, an election was held in the town of Brooklyn, to determine whether the town would subscribe fifty thousand dollars to the stock of said C. & Rock River R. R. Co. The notices for the election, stated expressly, should the vote of said town be cast in favor of said subscription, none of the bonds in payment for said stock, should be issued, or draw interest; or be delivered to said Railroad Company, except as follows: "When said railroad shall be completed, and cars running thereon, through said town of Brooklyn, *then* said bonds to be issued and delivered to said Railroad Company upon such express terms, *and not otherwise*. That a majority of the voters, voted at such election, to make such subscription." That afterward, on the 23d May, A. D. 1870, the supervisor of the town, executed and signed a paper purporting to subscribe in the name of such town, fifty thousand dollars to the capital stock of said C. & R. R. R. R. Co. Said subscription, expressly provided, that such subscription was made, upon the express understanding, as provided in said notices of election: that no payment was to be made, until the road was completed, and cars running thereon through said town of Brooklyn. The subscription to be paid, in the bonds of the said township.

Plea avers, that the supervisor had no authority, or power, to issue any bonds or coupons, to said company; until said railroad should be completed. That said railroad had never been completed. Yet W. J. Guffin, the supervisor of the town, without authority or legal power, on or about the 7th November, A. D. 1872, pretended to sign and issue in behalf of the town, bonds to the amount of fifty thousand dollars, to said C. & R. R. R. R. Co., with interest coupons attached; of which the interest coupons declared upon are a part.

Defendant claims, that said bonds and coupons are wholly void, and are not obligatory, for the reason, that the railroad company had not at the time said pretended bonds were issued, complied with the conditions, in the notices of election and

subscription to the capital stock, specified, as conditions precedent to the issuing of such bonds. That the said company had not at that time nor has it at any time since, completed its road, but had left that portion, lying between a point in DeKalb County, a short distance east, of the east line of Lee County, and the Chicago branch of the Illinois Central Railroad, wholly unbuilt; and had also left that portion of its railroad, extending from the city of Amboy, in a southerly direction, to intersect the C. & R. I. R. R., or the C. B. & Q. R. R., in Bureau County wholly unbuilt and uncompleted and has wholly abandoned the further building and completion of its said Railroad.

7

Plea further alleged, that immediately upon procuring said pretended bonds and coupons, (of which the coupons declared upon are a part), the said C. & R. R. R. Co., turned the course of the road, they were then constructing, to the North-East, and built their road up to Shabbona Station: a point on the Chicago & Iowa Railroad in DeKalb County, Illinois: and at that point connected the eastern terminus of the C. & R. R. R. R., with the Chicago & Iowa Railroad: and that portion of the C. & R. R. Railroad before then constructed, has since been run and operated in connection with, and formed practically a part of the C. B. & Q. Railroad; so that said town of Brooklyn failed to obtain any railroad to Chicago, and failed to obtain a competing railroad thereto, with the C. B. & Q. R. R.

Plea further alleged, that just before the issue of said bonds and coupons, of which the coupons sued upon are a part, a rumor prevailed in the town of Brooklyn, that the C. & R. R. Railroad was about to be transferred to the C. B. & Q. R. R. Company, and the C. & R. R. Railroad would not be built and completed, as required by the notices of election, and subscription of the town of Brooklyn. That thereupon, the agents and representatives of the C. & R. R. Railroad Company were notified, that if their road was not to be built and completed, as promised, that the town of Brooklyn would not issue and deliver the bonds and coupons aforesaid. Thereupon the agents and representatives of the C. & R. R. Railroad Company informed the authorities and citizens of the town, that said company had no intention of not completing their said railroad, as promised; that the company would build the road through to Calumet as fast as was possible, with men and money. That thereupon the supervisor and town clerk, relying upon said representations, issued and delivered to the said company, the bonds and coupons, of which the coupons sued upon on are a part. That so soon as the bonds and coupons were delivered, the said company ceased to prosecute the further construction of their railroad, and refused to complete the same, and have abandoned the entire work.

Plea alleges that the representations of the C. & R R. R. Company were false and fraudulent, and so known to said Company when made. But such falsity was unknown to the town of Brooklyn, and the supervisor and town clerk, who issued said

bonds and coupons. That their issue and delivery were procured through said false and fraudulent representations. That the stock of the C. & R. R. R. R. Company is worthless. Has been so, ever since, the said company ceased to prosecute the completion of their said road, and abandoned the same, and the said road passed into the hands of the C. B. & Q. R. R. Company; which was immediately after the issue of the bonds and coupons aforesaid. That the town claims no interest in the stock of said C. & R. R. R. Company. The town has received no value for their bonds and coupons. That the same were procured by fraud, &c.
8

3d Plea. The same as in second plea, and further, that the plaintiff was not a bona fide assignee of the interest coupons declared upon, before maturity, and without notice of the defence set up in said second plea.

4th Plea. The causes of action the same, in all the counts, to wit, the interest coupons declared upon, in first count of plaintiff's declaration. That said interest coupons, and bonds to which they were attached; were issued by the supervisor and town clerk, and delivered without the authority of the board of auditors, or corporate authorities of the town of Brooklyn. That the supervisor of said town, who issued and delivered the same, acted therein fraudulently, and in collusion, with the parties to whom the same were delivered, the said supervisor, knowing at the time, he had no such authority. He had been elected supervisor of the town, on the express pledge on his part, and with the understanding between him, and those who voted and supported his election, that he would not issue and deliver, said bonds and coupons until the Chicago & R. R. Railroad, had been completed its entire length, to the Chicago branch, of the Illinois Central Railroad, &c.

5th Plea. Causes of action same in all the counts to-wit said coupons. That on 14th of November, A. D. 1873, the town of Brooklyn and others, had obtained a decree in the circuit court of Lee county, Illinois, against the said Chicago & Rock River Railroad Company, and the assignees of the bonds and coupons aforesaid, of which the interest coupons, declared upon in the plaintiff's first count of his declaration, are a part. That the defendant was made party defendant, with the other holders and, owners, by the name and description of the unknown owners, of such bonds and coupons. That said circuit court of Lee county had jurisdiction of the subject matter, and of the parties defendants, by the issuing and return of process, and by proof of publication, made as requried by the statutes of the State of Illinois in cases of non-resident defendants. That the said court rendered therein, a decree, that such pretended bonds and coupons were void, and in no wise obligatory on the said town of Brooklyn, and that the same be surrendered up, to be cancelled, which said decree still remained in full force and effect, &c.

9 Printed Record, pages 9, 10 and 11.

The plaintiff, on the 14th October A. D. 1875, joined issue, on the plea of the general issue, and filed a general demurrer, to defendant's 2d, 3d, 4th and 5th Pleas.

Afterwards, on the 16th October, A. D. 1875, the plaintiff withdrew, that portion of his demurrer, that related to 3d plea, and filed his replication to said 3d plea, that the said plaintiff was a bona fide assignee of said coupons declared upon, and that the same were assigned to the plaintiff, before maturity for value, without notice, of the defence in said plea set forth.

On the 16th October, A. D. 1875. The court sustained the plaintiff's general demurrer to the 2d, 4th and 5th pleas of defendant, holding that the facts therein stated, constituted no defence to plaintiff's recovery, unless it was alleged as stated in the 3d plea, that the plaintiff was not a bona fide assignee without notice of the facts before maturity, as set up in defendants 2d plea.

After the sustaining of said demurrer, defendant did not further appear to defend, his defences having been held to be inadmissible.

On the 13th March, A. D. 1876, the plaintiff appeared, and upon motion of his attorney a jury was called, to try the "*issue* joined," upon the "plea herein:" the jury found the issue, for the plaintiff, and assessed his damages at $5,511.00.

"Defendant afterwards moved for a new trial, but did not appear to press his motion. But sued out a writ of error, to this court, and now assigns for error, that the said circuit court erred:

1st. In sustaining plaintiff's demurrer, to defendant's 2d, 4th and 5th Pleas, and each of them respectively.

2d. That the court erred in rendering judgment for the plaintiff, on the verdict of the jury.

Plaintiff in error insists, that his 2d, 4th and 5th, Pleas, each and all, presented good and sufficient defences, to plaintiff's right of recovery.

The pleas are conformable to the Illinois practice.

Bissell vs. City of Kankakee, 64 Ills., 250.

A general demurrer, cannot be sustained to special pleas, that set up substantial defences, though the matter of them, could have been given in evidence under the general issue; such objection, can be reached only, by special demurrer, or motion to strike from the files.

Pendleton County vs. Amy, 13 Wallace 303.

The 3d plea, which is the same as the 2d, with the addition, that the plaintiff was not a bona fide assignee, is conceded to be a good plea. The plaintiff withdrew so much of his demurrer, filed October 14th, 1875, as pertained to this plea, and filed his replication thereto, denying that he was not a bona fide assignee. This withdrawal, and filing of replication, occurred on the 16th *October, A. D.* 1875: *the day* the circuit court decided the demurrer to the 2d, 4th and 5th pleas: showing that said action, was predicated upon the decision of the court, that the 3d plea was valid. The only possible objection then, to the 2d plea is its omission to deny, that the plaintiff was a bona fide assignee of the coupons declared upon. It is difficult to conceive, of any other exception to said 2d plea, as it clearly alleges, a *want of authority*, to issue the purported bonds and coupons of the town. That the conditions of their issue had not been performed; the completion of the railroad: That the bonds and coupons were obtained by fraudulent misrepresentations. It could not be reasonably insisted, that the vote of the town, and subscription, authorized the issue of such bonds and coupons, when the railroad was simply completed, through the town. Such is not an admissible construction, deducible from the language of either the vote of the town, or of the subscription, to the stock of the railroad company. The plea also alleges, that such was not the understanding of either party. That to induce the voters of the town, to vote a subscription: the railroad company, located the line of their road clear through, to the Chicago branch of the Illinois Central Railroad, and the officers and agents of the company gave out that they were about to construct, a through line of railroad to Chicago: that would be a competing line with the Chicago B. & Q. Railroad: which run to Chicago, passing a little south of the town of Brooklyn. That to induce the officers of the town to issue the bonds and coupons, said Railroad Company, represented to such officers, that the Company had no design, of not completing their road as promised; but that they would build the road through to Calumet, (on the Chicago branch of the Illinois Central Railroad in the suburbs of Chicago), as fast as men and money could do the work. That these representations, induced the town officers, to issue and deliver the bonds and coupons. The plea shows, what the people of Brooklyn desired, and what was promised to them by the railroad company, was a through line to Chicago, competing with the C. B. & Q. R. R. which was not obtained, but that

the C. & R. R. R. R. Company so soon as they had fraudulently procured, the bonds and coupons, ceased to prosecute the building of the road: made the little portion completed, a tail or adjunct to the C. B. & Q. R. R.; operating it as a part of the C. B. & Q. and abandoned forever the completion of their road. The plea shows, that the Railroad Company to whom the bonds were delivered, committed a shameful fraud upon the town of Brooklyn. That the town received no value for the bonds or coupons; and that the town should not pay them. But it is insisted, that the town is compelled to pay, because the plaintiff is a bona fide purchaser.—Railroad municipal bonds are made the most gigantic robberies of ancient or modern times: by the universal practice, of the fraudulent obligees of bonds, pretending to transfer them to alleged innocent purchasers—such pretended innocent purchasers, generally being the confederates of the dishonest obligees. The same names, Marcy, Post, Ætna Life Ins. Co., *et al.*, nearly always appear, as the innocent purchasers, but really are the criminal receivers of stolen bonds. They always swear they were innocent purchasers. They never admit they were knowingly, purchasers of forged or fraudulent bonds. They are non-residents. The defrauded towns, cities and counties, can never prove that they are not bona fide purchasers. Such assignees can so arrange the fraud, that no proof can be obtained except it be from themselves—which makes them secure; *Be their testimony* ever so false, they can escape conviction for perjury.

Their testimony has been always the same, that they were innocent and bona fide owners. In no case within my knowledge or reading, have municipal bonds, shown to have been assigned to other than innocent purchasers.

Fortunately in this case, the plaintiff's right of recovery is based solely on the coupons; does not claim that his right of recovery, is aided by recitals in the bonds; does not allege that bonds were ever issued: or that they coutained any recitals, of the performance of the condition precedent, upon which the authority to issue the bonds and coupons depended. The defendant in this case, was not therefore precluded, from setting up by his pleas, the truth, and if the facts alleged in this plea, are a good defence to the right of recovery, the defendants plea is good; though the plea does not allege that the plaintiff was not a bona fide assignee before maturity, of the coupons declared upon. If the recitals in the bonds to which the coupons were attached, estopped the defendant, from insisting upon the non-performance, of thec onditions precedent, necessary to authorise the issue of such bonds and coupons, plaintiff should have filed a replication, setting up such estoppel; not having filed such replication, by demurring to the plea, plaintiff concedes that there is no such estoppel.

A County may be estopped by recitals in the bonds, of the performance of the conditions upon which such bonds were authorized to have been issued: but such estoppel must have been

set up by the plaintiff in the pleadings; otherwise the plea setting up such non-performance, presents a valid defence to the right of recovery.

Pendleton County vs. Amy, 13 Wallace, 303 and 305.

"The complainant gave no copy of the bonds, but alleged, "that such bonds were issued pursuant to an order of the Coun- "ty Court of Dallas County, made on the 18th May, 1871. This "the defendant denied. We think the plaintiff erred in not de- "nying the defendants answer. Thus admitting the County "Court had never exercised such power. *The plaintiffs case* "*is not aided by the allegation, that he is a bona fide holder of* "*the coupons for value. Good faith is unavailing, when there is* "*an entire want of authority, in those who profess to act. The* "*judgment must be reversed.*"

The County of Dallas vs. MacKenzie, 94 U. S. Rep., 660.

It is the established ruling of this court that to preclude municipal corporations, from insisting, that they are not liable to pay bonds and coupons issued by such corporations, without the precedent performance of the conditions upon which their issue was authorized: the constituted authorities of such corporations must have decided; that such conditions had been performed; and their decision must have appeared in the recitals of such bonds, to *assure the purchasers* that same had been so performed, otherwise such purchasers, are not protected, if it be shown, that such conditions had not been performed.

"The bonds recite, that they are issued under and by vir- "tue, of the act, incorporating said railroad company, approved "March 24th 1869, and in accordance, with the vote of the elec- "tors of said township, held at a regular election, July 28th 1869, "in accordance with said law. The persons appointed, to decide "whether the necessary prerequisites, to their issue, had been "completed; have decided, and certified their decision. *Their* "*recitals* (in the bonds) *are such decision* and beyond them "(the recitals in the bonds) a bona fide purchaser, is not bound "to look for evidence, of the existence of things in pais. There "is nothing, in the case of Marsh vs. Fulton Co., 10 Wall. 276, to "which we have been referred; inconsistent with the rule thus "asserted. *In that case there were no recitals in the bonds*, and "there was no decision, that the conditions precedent to sub- "scription had been performed. The question was therefore "open."

Town of Colbma vs. Eaves 92 U. S., 484, 490, 492.

Judge Bradley in said case, concurring, says:

"But a mere execution and issue of the bonds, without such "recital (in the bonds) *is not in my judgment conclusive.* It "may be prima facie sufficient, *but the contrary may be shown.* "This seems to me the true distinction to be taken on the sub- "ject; and I do not find the contrary opinion, has ever been de- "cided by this court. There have been various dicta to the

"contrary. But the cases when carefully examined, will be "found to have all the prerequisites, necessary to sustain the "bonds: according to my view of the case."

Same case, 92 U. S., 493.

Justice Miller, Davis and Field, dissented, and held the bonds to be invalid, notwithstanding such recitals.

"In the late case of the town of Coloma vs. Eaves, 92, U. S. "484, we considered it fully, and reviewed many of our former "judgments. We there held, that where, by legislative enact- "ment, authority has been given to a municipality, or its officers, "to subscribe for the stock of a railroad company, and issue "municipal bonds in payment, and where it may be gathered "from the enactment, that the officers of the municipality, were "invested with power to decide; whether the conditions had "been complied with, *their recitals that it had been; made in "the bonds issued by them* and held by a bona fide purchaser, "is conclusive of the fact, and binding upon the municipality. "*For the recital is itself a decision of the fact by the appointed "tribunal.*"

Commissioners vs. Bolles, 94, U. S. 104 and 108.

To the same effect are—

Commissisoners, &c., vs. January 94 U. S. 202, 205.
" vs. Clark, 94 U. S. 278, 287.
Town of Vienna vs. Murdock, 92 U. S. 494, 498, 499.
Marcy vs. Township of Oswego " 637, 639.
County of Warren vs. Marcy, 96 U. S.
Humboldt Township, vs. Long, *et al.*, 92 U. S. 642.

A want of authority to issue bonds, is fatal to their validity, even though held, by innocent purchasers for value.

"This is not a case where there has been an irregular, or de- "fective execution of a power, in issuing bonds, by a corpora- "tion, having lawful authority to do so; but here is a total want "of authority; and hence the bonds are absolutely void. It is "urged, that where a corporation has power under any circum- "stances, to issue negotiable securities. The bona fide holder "has a right to presume they were issued under circumstances "which gave the requisite authority; and because the holders in "this instance, had no notice of want of authority; the bonds "cannot be impeached in their hands; whatever presumption, "may be indulged, with regard to private corporations; no such "presumptions prevail in regard to municipal corporations. The "bonds of a municipal corporation issued without legal authori- "ty, are void even in the hands of an innocent purchaser, without "notice, of the want of power in the corporation to issue them."

Bissell vs. City of Kankakee, 64 Ill., 249.

"A provision of the constitution of the state of Illinois, which "took effect, on the 2d July, 1870; positively prohibited a sub- "scription, to the capital stock of a railroad corporation; by "any county, city, township, or other municipality, unless such

"subscription has been authorized, under existing laws, by a "vote of the people prior to the date mentioned. We have "held, that a town cannot subscribe for stock, in a railroad cor- "poration, unless it has the authority of the legislature, for the "act. *Where the sanction of a popular vote is required it must "be obtained.* It is not a case of informality, irregularity, fraud "or excess of power, in an authorized agent. *Where there is a "total want of authority to issue the bonds, there can be no such "thing as a bona fide holding.*"

The Township of East Oakland vs. Skinner, 94 U. S. 255.

The bonds and coupons, purporting to have been issued by the town of Brooklyn, were issued and delivered, November 7th, 1872, after said provision of the constitution took effect. The only popular vote, purporting to authorize their issue, was on the 20th September, A. D. 1869, which expressly prohibited their issue, *until the road was completed*, and the cars running through the town. The road was never completed. The statute under which the bonds and coupons purport to have been issued, required a majority vote of the town to authorize their issue. See the charter of the Chicago & Rock River Railroad Co., approved March 24th, 1869, found on pages 965-7,-8,-9, of 2d vol. Private Laws of 1869, of the State of Illinois, which said charter or act, is made a public act.

Said bonds and coupons having been issued without a vote of the town of Brooklyn, authorizing their issue, except in a certain contingency which never occurred. Said bonds and coupons were issued without authority, and are void in the hands of even an innocent purchaser for value.

"The vote for the subscription was had, and the subscription "made prior to the adoption of the present constitution, al- "though the bonds were not issued until after that time. The "constitution of 1848 is to govern."

Decker, *et al.*, vs. Hughes *et al.*, 68 Ill. 40.

"The rule may be considered settled, that a municipal cor- "poration, may successfully defend against its bonds, in whom- "soever hands they may be, if its officers or agents who assumed "to issue them, had no power to do so."

Burr *et al.*, vs. City of Carbondale, 76 Ill., 470.
1 Dillon on Mun. Corporations, 524.
Barnes vs. The Town of Lacon, 84 Ill., 461.

"The obligations assumed under existing laws, cannot since "the adoption of the (present) constitution, be enlarged, or "materially changed; either by the action of the people of the "township, or its corporate authorities, *all power is taken away.* "No such bonds as these, were voted by the people of the "township, under existing laws, prior to the adoption of the "constitution, (1870) and hence they are absolutely void, even "in the hands of a holder, who may have paid value for them.

"The burden rests upon the party, alleging the validity of "bonds, issued *since the adoption of the constitution*, (1870) to "show affirmatively, they were authorized by a vote of the "municipality, under existing laws, prior to the adoption of the "constitution. What action the board of auditors may have "taken since the adoption of the present constitution is of no "consequence, as they had no authority, to act in the premises."

Middleport vs. Ætna Life Ins. Co., (the plaintiff in this case) 82 Ill. 568.

To the same effect,

Board of Supervisors of Jackson Co., vs. Brush, 77 Ill., 59.

These decisions of the Supreme Court of Illinois, establish: That the action of the supervisor and town clerk, undertaking to issue the purported bonds and coupons, before the railroad had been completed, being expressly prohibited, by the vote of the town of Brooklyn, and the subscription to the stock of the railroad company, was unauthorized, null and void, and such bonds are void in whomsoever hands they be found. They are the same as forged paper, have no validity. No difference exists between this, and any other case, where a pretended agent without authority signs another's name to a promissory note, and a third man not knowing of such want of authority, purchases the purported note. The purchaser being ever so innocent cannot recover. He holds no note of the purported maker.

2d. The bonds and coupons, alleged to have been issued by the town of Brooklyn, so far as there was any authorityfor their issue; were authorized, prior to the adoption of the present constitution of Illinois; and are governed by the constitution of 1848. Decker et al., vs. Hughes et al., 68 Ill., 40. That constitution as defined, by the Supreme Court of Illinois, forbid the creation of any municipal indebtedness, without the authority of the voters of the municipality, or its corporate authorities. The Supreme Court of Illinois, and this Court, have decided, that the Supervisor and Town Clerk, are not the corporate authorities, and can authorize no obligation against the corporation.

The 2d and 4th pleas, allege, that the bonds and coupons were issued by the supervisor and town clerk, without the authority of the corporate authorities; or of the voters of the town of Brooklyn. Consequently such bonds and coupons were unauthorized and prohibited, by the constitution of this state. The constitution of this state of 1848 and 1870 are substantially alike in these provisions. Therefore, both the 2d and 4th pleas were good, and the Circuit Court, erred in sustaining to them a general demurrer.

"The 5th section of article 9, of the constitution of Illinois, adopted in 1848, forbids the legislature, to grant the power of local or corporate taxation, to any other persons, than the local or corporate authorities."

Howard *et al.*, vs. St. Clair Co. Drain Co., 55 Ill., 133-4-5.

"Only the corporate authorites, can levy a tax, *or create a debt.*"

People vs. Solomon, 51 Ill., 48.
" " Mayer, 51 Ill., 30.
Wider vs. City of East St. Louis, 55 Ill., 136.

"The power to levy a tax or *to create a debt* to be discharged by the levy of a tax; are the same thing."

Livingston vs. Wider, 53 Ill., 305.
People vs. Mayer, 51, Ill., 31.
Marshall *et al.*, vs. Silliman, 61 Ill., 218.

"It rests only with the citizens, or corporate authorities, to determine whether they would incur the debt; or levy the tax for corporate purposes."

Dunnavan vs. Green, 57 Ills. 69.
Decker, *et al.*, vs. Hughes, *et al.*, 68 Ill., 44.

"The town supervisor and clerk, who issued these bonds, do "not represent a township, as a board of trustees, represent an "incorporated town or a common council represent a city. The "supervisor and town clerk, are but a part of the corporate au- "thorities. They have no power of taxation of themselves, to "bind the township in any way. The legislature could not clothe "these two officers, without the consent of the people, with a dis- "cretionary power of taxation; or of creating a debt. They "are not of themselves, the corporate authorities, in the sense "of the constitution."

Marshall *et al* vs. Silliman 61, Ill., 225.
Wiley vs. Silliman, 62 Ill., 170.
Town of Elmwood vs. Marcy, 92, U. S. 289.

Had the vote of the town been for an unconditional subscription, so that the clerk and supervisor had acted merely as the clerks, or ministerial agents of the town to carry into effect the vote of the people, such supervisor and town clerk could have made the subscription and executed the bonds, on behalf of the town, as the vote of the town, would have created the indebtedness. But the vote having been conditional that the bonds should issue, only in case the railroad was completed, and cars running through the town; and as the road never was completed, no indebtedness was created by the vote of the town. The proper tribunal to decide, whether such road had been completed, was the board of auditors, or corporate authorities of the town. The legislature could not deprive the corporate authorities, of their legal and constitutional right to determine whether the road had been completed, so as to authorize the issue of the bonds and coupons; and confer this authority upon the supervisor and town clerk.

Where the conditions of the election were, that no part of the bonds to be issued in payment of stock of the railroad company, should be delivered, *until the road should be completed.*

The Supreme Court of Illinois said, "conceding the subscription had been authorized by a vote of the people of the county, nevertheless it was upon express conditions annexed; and no liability, rested upon the county to issue the bonds, until these conditions had been fully performed. Who is to determine when these bonds shall be issued and delivered to the railroad company *et al.*; clearly it must be the regular constituted officers of the county, elected by the people, and intrusted, with the management of all financial matters of the county, and all municipal affairs." *This is an official trust, which cannot be delegated.*

Jackson Co. vs. Brush 77 Ill., 69.

The legislature ordinarily (the only exception being in cases of insurrection), has no power to impose a debt, or levy a tax, upon a municipal corporation, without its assent, *or to authorize persons not corporate authorities, either directly or indirectly to create a debt; or levy a tax without the consent of those to be affected by it; or their municipal authorities.*

Wider *et al.* vs. The City of East St Louis *et al.*
55 Ill. 133, 136.

"The legislature has not the constitutional power to authorize, trustees of schools to call an election, to vote on the question of the issue of railroad bonds, and if the election is carried, to subscribe to the capital stock of a railroad company, and issue bonds. Because they are not corporate authorities for such purposes, and such act is therefore in violation of Sec. 5 article 9 of the constitution of 1848.

The People &c. vs. Depuy *et al.* 71 Ill. 651.
Trustees of Schools vs. The People 63. Ill. 299.

It appears further, from the act of the legislature, authorizing subscription by municipal corporations, to the capital stock of the Chicago and Rock River R. R. Company, approved March 24th 1869, 2 vol. private laws of Ills., of 1869, pages 965-7-8, that it was the design of the legislature to simply authorize the supervisor to subscribe and issue bonds, as the clerk, or penman of the township without any discretion, or judgment of his. That he was not empowered by such statute to act as a deciding board for the town, or to use discretionary power.

The vote of the town conferred no such authority on the supervisor. The vote of the town, and the subscription; authorized the bonds to be issued, when the railroad should be completed, and not when, in the judgment of the supervisor the same had been

completed. The completion *had actually to occur in fact*, not merely in the opinion of the supervisor, before the bonds were authorized to be issued.

The 2d plea expressly negatives any presumption that the officers, who issued the town bonds had decided; that the conditions of their issue had been performed, which was the completion of the road, &c. The plea alleges, that such officers were induced to issue and deliver such bonds, upon the false and fraudulent assurances of the railroad company, that the company, would thereafter complete such railroad, which had never been done, but which was abandoned by the company, immediately, upon their obtaining the town bonds.

Had the supervisor and town clerk made recitals, in the bonds or coupons that the prerequisites, to the issue of the bonds, had been performed; such recitals would have conferred no validity on such bonds or coupons. Such recitals, not having been made by the proper authorities, or tribunal who alone had the power to make such determination. The recitals would have been unauthorized, by the constitution of the state, the act of the legislature, authorizing such subscriptions and issue of bonds, the vote of the people of the town of Brooklyn, the contract of subscription, and the actual facts.

Such acts of the supervisor and clerk had they occurred, would have been unavailing to the plaintiff, and other bondholders. But no such recitals either in the bonds or coupons, were claimed by the plaintiff, in the circuit court, nor did plaintiff, claim or allege, that such determination had ever been made, by the supervisor or town clerk, or the corporate authorities of the town of Brooklyn, or even the railroad company.

Under the present constitution of the State of Illinois, of 1870, there is no presumption in favor of the validity, of municipal bonds issued since the adoption of that constitution. These bonds having been issued since the adoption of such constitution, the whole presumption is to the contrary.

And the plaintiff had to furnish evidence of the validity of such bonds, to entitle him to recover. The plaintiff alleged no such *evidence and offered none*. "The burden rests upon the "party, alleging the validity of (municipal) bonds issued since "the adoption of the constitution (of 1870), to show affirmatively "they were authorizied, by a vote of the municipality, under ex-"isting laws; prior to the adoption of the constitution."

Middleport vs. Ætna Life Ins. Co. 82 Ills. 568.
Jackson County vs. Brush 77 Ills., 59.

The coupons sued upon, were not authorized by a vote of the municipality and are therefore, not the coupons of the town.

The 2d plea of the defendant was therefore unquestionably valid, and the demurrer should have been overruled.

The 4th plea, alleges, that the bonds and coupons were issued without the authority of the board of auditors, or corporate authorities of the town of Brooklyn, but by and through collusion, between the supervisor of the town and the parties obtaining the same. That the supervisor knew he had no authority to issue such bonds and coupons, and had pledged himself, to not deliver the same, until the whole road had been completed, and that the same had never been completed.

Neither declaration or plea, alleges that such bonds or coupons, were authorized by any act of the legislature, or vote of the town. Under the foregoing decisions cited in this brief, I fail to perceive, why said plea was not substantially good. The Circuit Court, erred in sustaining a general demurrer to this plea.

The 5th plea alleges, that the Circuit Court of Lee County, Illinois, having jurisdiction of the subject matter and of the defendant, by the proper issue and return of process, &c., had decided the said bonds to be void and invalid, and ordered the same to be canceled, before the institution of plaintiff's suit. The plaintiff in not filing a replication, denying the jurisdiction of the said Circuit Court of Lee County, and by demurring, to the plea, admitted the jurisdiction, and was therefore bound by the decision of said court. The plea was valid and the demurrer thereto should have been overruled.

There were five pleas, the court sustained a demurrer, to the 2d, 4th and 5th; and issues of fact were joined on the general issue, and the 3d, a special plea.

After the circuit court, had sustained a general demurrer to the 2d, 4th and 5th pleas, defendents defences, having been held by the court to be inadmissable, the defendant did not further appear, plaintiff only appeared, and on motion of his attorney; a jury was called "*to try the issue joined on the plea herein.*" The jury found the ISSUE for the plaintiff. There having been two pleas, and two issues joined, and the jury having only determined the issue on one plea, left the other plea and issue undisposed, consequently the plaintiff, was not entitled to a judgment on the verdict. The court erred, in rendering judgment for the plaintiff, on that verdict, and the judgment of the Circuit Court, should be reversed.

MILTON T. PETERS and
THOS. J. HENDERSON,
Atty's for Plaintiff in Error.

TOWN OF BROOKLYN,
vs.
ÆTNA LIFE LIFE INS. CO.,

SUPREME COURT OF UNITED STATES,
OCTOBER TERM, 1878.

AUTHORITIES CITED, AND POINTS PRESENTED FOR PLAINTIFF IN ERROR, IN REPLY TO THE BRIEF FOR DEFENDANT IN ERROR.

The affidavit to the plea of nonassumpsit, *expressly alleges*, "that the plea is true in substance and fact."

Printed record, page 5.

2d and 3d pleas, expressly allege, "that said town received *no value whatever*, for the bonds and coupons aforesaid."

Printed record, page 7.

Neither the declaration or 4th plea allege, or concede by reference to any other plea or pleading or otherwise, that the bonds and coupons, were issued under any statute, or authorized by any vote—why is not the plea good?

Printed record, page 8.

"The plaintiff cannot use one plea as evidence of the fact, which the defendant disputes in another plea. One plea cannot be taken advantage, to help or vitiate another."

1 Chitty Pl. page 563.

2d and 3d pleas allege, that the vote of the electors and the subscription, expressly provided, that the bonds and coupons were to be issued and delivered *only* when the railroad was completed, and *not otherwise*.

Printed record, page 6.

Under the charter of the Chicago & Rock River Railroad Company, conditional subscriptions were authorized.

"We have no hesitation in saying, that the electors might vote a subscription on any conditions they might see proper to annex, and that the company can only receive it, on the terms proposed by the vote."

The People vs. Dutcher, 56 Ill. 149.

This case was decided at the September term, 1870. two years before the bonds and coupons were issued in the case now before the court. Plaintiff below had notice, when he bought these coupons, of the construction of the statute, thus given by the Supreme Court of Ills.

"Obligations assumed, under prior existing laws, cannot, since the adoption of the constitution of 1870, be enlarged or materially changed, either by the action of the people of the township or its corporate authorities, all power is taken away."

Middleport vs. Ætna Co., 82 Ills. 568.

In the above case, there was a statute, that authorized the issue of such bonds. The Supreme Court of Illinois held that the supervisor and town clerk were not the authorities of the township. That no railroad debt could be incurred or bonds issued, except authorized by a vote of the electors. That when issued since the adoption of the constitution of 1870, the burden of proof was upon the *bona fide* bondholder, to show affirmatively, that such bonds, were authorized by a vote of the municipality, under existing laws, prior to the adoption of such constitution. Same, page 567.

The corporate authorities only, could determine that the railroad had been completed, so as to authorize the issue of the bonds and coupons.

Jackson Co. vs. Bush, *et al.*, 77 Ills., 63–64.

This Court decided in the County of Dallas vs. McKenzie, 94 U. S., 660, that there was a statute which authorized the issue of the bonds, but that under the facts they were unauthorized in this case. The Court said: "The plaintiff's case is not aided by an allegation, that he is a holder for value of the coupons. Good faith is entirely unavailing, when there is an entire want of authority in those who profess to act. If A. forge the name of B. to a promissory note, or without authority A. sign a note as his agent, and there be no ratification, no amount of good faith in the holder, will enable him to recover upon it. Good faith to the person who does not authorize the use of his name, requires that he should be protected against a holder, who pays his money for a forged or unauthorized note."

"It is urged, that where a corporation has the power under any circumstances to issue negotiable securities, the *bona fide* holder has the right to assume they were issued under circumstances which gave the requisite authority. Whatever persumptions may be indulged with reference to private corporations, no such presumptions prevail in regard to municipal corporations.

Bissell vs. City of Kankakee, 64 Ill., 249.

In the case of County of Randolph vs. Post, cited in defendant's brief, 3 Otto 502, no *material change* was made in the contract. The road had been completed *before* the bonds were issued. No exception had been taken in the court below to the performance of the contract. The record showed that the road had been completed according to contract.

In the case now before the court, the road was *never completed*. It was so conceded in the record, and the objection was urged in the court below.

Pendleton County vs. Amy, 13 Wall 305, cited in brief for defendant in error, is a Kentucky case, on Kentucky bonds, and not an Illinois case, as stated on page 12 of said brief.

In the Pendleton County case, the declaration *expressly* alleged the issue and receipt of Stock, and the County was still said owner.

In the case now before the Court, there is no such allegation or concession, in any of the pleadings.

If Stock had been issued to the Town, it was necessarily contemperaneous with the issue of the bonds and coupons; which did not occur until the 7th November, 1872, *after* the constitution of 1870 had taken effect; which debarred any change in the contract on which the subscription had been made, or waiver of its provisions "all power had been taken away" as decided in 82 Ill. 568—see likewise, P. & O. C. R. R. Co., vs. Hartford 58, Maine 27.

Pendleton County case 13 Wall 298—holds only this, that where the pleas no not deny facts alleged in the declaration, they are admitted, not that statements in one plea, can be used as evidence of facts denied in another plea, as claimed in said brief.

The case cited in said brief of 21 Wallace 322, (Chambers vs. Chews) is where a special demurrer had been sustained to a special plea, setting up facts, admissible under the general issue without verification—The defendant having on the trial, been allowed to give evidence under the general issue of the facts alleged in the special plea.

In the case now before the Court, the general issue was verified; which compeled the plaintiff to prove the execution of the coupons: and the issue joined in the 3d plea, likewise compeled the plaintiff to prove that he was a bona fide holder for value.

Plaintiff had to prove both allegations to recover. The jury having only tried one issue, the record not disclosing which; the plaintiff was not entitled to judgment. The defendant as shown by the record did not appear.

All the cases cited in brief for defendant in error, show the necessary recitals in the bonds. The brief omits to state that such recitals, were the reasons given for the Court's decisions. This expressly appears in the following cases cited in said brief:

Cases of Knox Co., vs. Aspinwall, 21 Howard 545, Cromwell vs. County of Sec. 94, U. S., 359 Coloma vs. Eames, 2 Otto 490. The other two cases cited in said brief on that point, show that the bonds did contain the necessary recitals.

Gelpecke vs. City of Dubuque, 1 Wall 178. Meyer vs. City of Muscatine, 1 Wall 388.

Neff vs. Penoyer, 95, U. S., 714 is not in point on the 5th plea.

MILTON T. PETERS,
T. J. HENDERSON,
Atty's for Plaintiff in Error

No. 177.

TOWN OF BROOKLYN,

vs.

NA LIFE INSURANCE COMPANY.

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laintiff in Error in reply to brief of
efendant in Error.

PETERS & HENDERSON,
Atty's for Plaintiff in Error.

UNITED STATES OF AMERICA,

IN THE

SUPREME COURT.

OCTOBER TERM, A. D. 1878.

THE TOWN OF BROOKLYN, *Plaintiff in Error.*
vs.
THE ÆTNA LIFE INSURANCE COMPANY.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

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H. W. Rokker, Printer, Springfield.

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BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

On the 16th of October, 1875, the Court, after hearing argument, sustained a demurrer to defendant's 2d, 4th and 5th pleas. Transcript, p. 10.

On the 13th of March, 1876, the cause having been called for trial, a jury was empanneled to try the issue joined upon the plea, and after hearing the evidence on the part of the plaintiff, and receiving the instructions of the Court, they found the issue for plaintiff and assessed his damages. T. p. 10.

The defendant afterwards entered motion to set aside judg-

ment and verdict, but assigned no reasons in his motion therefor, so far as the record shows, and did not even appear at the hearing to urge his motion with any reasons. Page 11, Transcript.

It is now claimed in this Court, as one of the errors of the lower court, that although two issues were joined, one on the general issue, and one on the 3rd special plea, or that portion of it which puts in issue the question whether plaintiff bought before due, for value, without notice of any of the defenses set up in said 3rd plea, only one of them was tried, the other remaining undisposed of. Page 16, plaintiff's brief.

With the exception of the *attempt* to put plaintiff on proof of the execution of the coupons by denying their execution *in the affidavit* attached to the general issue, the 1st plea and the 3rd are precisely alike in legal effect, the latter amounting to nothing but the general issue, there being nothing in it which could not as well have been offered in evidence under the general issue; consequently, as the whole merits of the case were put in issue by one plea, and tried, there was no error in leaving the other technically undisposed of.

Chambers Co. v. Clews, 21 Wall. 317, 322.

The Law of Municipal Bonds—Dillon—p. 18 (note 23, 3rd clause). The first case cited (p. 322) disposes of this exact question.

If plaintiff below was not required to prove the execution of the coupons, under the pleadings, then there was but *one issue to try*, viz.: that of *bona fides* raised by the 3rd plea, all the other allegations having been disposed of on demurrer, as being no defence, if plaintiff had no notice, and was the assignee before due for value.

Under the Illinois pleading and practice, it was not required of plaintiff to prove the execution of the coupons unless defendant had interposed the *plea of non est factum* verified by affidavit.

Ills. Rev. Statutes 1877, p. 738. § 34.

Walter v. Trustees of Schools, 12 Ills. 63.

Hunt v Weir, 29 Ills. p. 83.

What the defendant did, was to file the general issue, accompanied by an affidavit, *the latter containing the statement* that the town did not execute nor authorize the execution of the coupons.

Of this statement plaintiff was not obliged to take any notice whatever, it neither put the question of execution in issue, like a plea, nor was it *evidence* for the defendant.

It has been attempted before, under the Illinois practice, to raise this issue on the "special notice" filed with the general issue, and the Court said it was "irregular and incompetent to "form either issues of law or fact *on the notice*. A notice is "not a plea, and requires no answer from the plaintiff."

Burgwin v. Babcock, 11 Ills. p. 30.

Much less, then, would it be regular or competent for the defendant to have formed this issue *on an affidavit*. Such a defence must be by *plea*, verified by oath.

Hunt v. Weir, 29 Ills., p. 83.

This being the law of pleading and practice in Illinois, there was nothing for the plaintiff to do but to present his coupons and prove that he was the assignee of them, before due, for value, without notice of the defences set out in the 3rd plea, as he had alleged in his replication to the same.

This would dispose of the whole case, as defendant was not present by attorney to offer any proof in defence. So admitted in its brief on p. 16.

The coupons had to be *presented* in trying the issue of *bona fides* raised on the third plea. And that would have been all plaintiff would have had to have done under the general issue, as it stood, because it did not put their execution in issue.

Having presented them in trying the issue on one plea, what was the necessity of presenting them again under the general issue? trying the issue, then, on the third plea, effectually and substantially disposed of both, and of the whole case remaining after the demurrers had been sustained.

Again, even assuming that the general issue, supplemented by such an affidavit, did form the second distinct issue as to the execution of the coupons, and that the jury seem, from the record, to have been only called on to try the issue on the third plea, leaving this other untried, did the Court commit error then? We think not.

The defendant distinctly admits once, or oftener, in his second plea, that the supervisor and clerk issued and delivered the coupons in suit! pp. 5 and 6 of Transcript.

On the authority, then, of Pendleton Co. v. Amy, 13 Wall. p. 304, proof on the part of plaintiff was unnecessary, and the Court may have so instructed the jury at the trial.

It is next claimed by plaintiff in error, that the declaration does not allege that any bonds were issued, nor that any law existed authorizing the issue of either bonds or coupons, and no allegation of any consideration for their issue and delivery, p. 2 of Plaintiff in Error's brief.

We do not understand that this is necessary in the *pleadings*.

The law, if private, as well as the bonds, may be produced *in evidence*, and likely were, for all the record shows to the contrary.

A count upon the coupons is all that is necessary; it is unnecessary to refer to, or describe the bonds, even by way of inducement.

The City v. Lamson, 9 Wall. 485, 482, 483.
21 How. 546.
3 Wall. 332.
7 Wall. 105.
21 How. 545.

But, here again, the pleas admit that bonds were issued and delivered by the supervisor and clerk, and that the coupons in suit were attached thereto, and that the bonds were to pay for certain stock in the railroad, and that the law under which they were authorized was the charter of the Chicago and Rock River R. R. Co., and that it was a public law. See these admissions in 2d plea, pp. 5 and 6 of Transcript.

The third plea being merely a repetition of the second, with the additional allegation of notice, of course, these admissions are contained in it also, the very one on which the issue of notice was joined and tried, such admissions obviate the necessity of similar allegations in the declaration; these pleas allege a consideration, an issue of bonds, and a public law authorizing it.

Next comes what is urged as the strong defense to the validity of these bonds, viz: that the road was never built as proposed and promised by the company officers. The changes are rung on this defense repeatedly, both in the pleas and argument.

It is said that this was a condition precedent to the issue of the bonds, and as it never happened, therefore there was no authority to the supervisor to issue them.

We think the validity of this defence depends upon the nature of the "power" conferred by the act upon the town and its officers, and who hold the bonds.

The act being a public one, and being cited both in defendant's pleas and argument, we may be allowed to refer to it, and the Court will also take judicial notice of it.

2 vol., Private Laws of 1869, p. 965.

The 16th section declares it to be a public law.

The 10th sec. authorizes any township along, or near, the route of said road to subscribe to its capital stock.

The 11th sec. imposes the only precedent condition required by the statute, viz.: the sanction of a majority of all the voters voting at an election to be called, etc., as in that section is provided.

This latter section further provides that if such majority vote is in favor of subscription, *it shall be the duty* of the supervisor to subscribe, in the name of the town, to the stock of the company, the amount so voted, and to receive a certificate of stock therefor, and also to execute to such company, in the name of the town, bonds, etc.

It is claimed that because the town (not the act) imposed, through its election notices, and in the subscription made on the stock ledger of the railroad, the further conditions that the supervisor should not issue the bonds voted until the road was completed, as promised by the company officers, that, therefore, bonds issued by the supervisor in disregard of *this* condition, are void in the hands of an assignee before due, for value, without notice of these facts. Is this the law?

The question is fairly presented by the record, because plaintiff's demurrer admitted the statement in the 2d and 3rd pleas

to be true, except the question of *bona fides*, and after the 13th of March, 1876, when this latter question was decided in plaintiff's favor, the single question of law remained, were these statements in the 2d plea, admitted by the demurrer to be true, a defence to the bonds in the hands of an assignee before due, for value, without notice of such facts?

We think, especially in view of the provisions of the charter, and the further admissions in the pleas, that it is not a valid defence.

The act itself imposed no conditions, except that of a favorable election. The 2nd plea, on p. 6 of Transcript, admits that an election was held in the town of Brooklyn on the 20th day of September, 1869, that notices thereof were given, and that a majority of the voters of the town, at such election, voted to make such subscription to the capital stock of said company.

Coupling these admissions with the allegation that the notices of the election, and the subscription, imposed a condition precedent on the town supervisor, does not weaken the force of the admissions, when the condition was not a *statutory* one.

If there was a law authorizing the vote and the subscription, and an election was held after notices given, and resulted in favor of subscription, then the statutory duty became incumbent on the supervisor, and he was authorized to subscribe on the books and issue the bonds. The conditions imposed upon him *by the town*, were in the nature of private instructions from principal to agent, of which a purchaser without actual notice, was not bound.

He was not obliged to hunt up the election notice, nor chase around after the stock ledger of the railroad, to see what condition *the town had imposed* on their supervisor different from, or

additional to, what the law required, and learn whether they had been complied with before he bought.

Aside from any recitals to estop, we understand the law to be as announced in Gelpcke vs. City of Dubuque, 1 Wall. p. 203: "When a corporation has power, under any circumstances, to "issue negotiable securities, the *bona fide* holder *has a right to* "*presume* they were issued under the circumstances which give "the requisite authority, and they are no more liable to be "impeached for any infirmity in the hands of such a holder "than any other commercial paper."

In Meyer vs. The City of Muscatine, 1 Wall. p. 393, this Court said: "A party taking the bonds was bound to look to "the *legal* authority under which the public agents acted. If "that were sufficiently comprehensive, *he had a right to presume* "that those empowered to act, and acting under it, had com-"plied with its requirements."

In the case of The Commissioners of Knox Co. vs. Aspinwall, 21 How. 545, it is true there were recitals in the bonds and which were produced in evidence, and yet, independently of these the Court say: "*Another answer* to the defense is, that "the purchaser of the bonds had a right to assume that the "vote of the county, which was made a condition to the grant "of the power, had been obtained, from the fact of the sub-"scription, *and the issuing of the bonds.*"

The further point was raised in this last case that suit could not be maintained on the coupons, *without producing the bonds*, but the Court held otherwise, p. 546. If this be so, then the production of the bonds with recitals, in order to recover on the coupons, would not be necessary, because the same presumption would still arise in favor of the *bona fide* holder of the

coupons. This Court, in its opinion, in the recent case of Coloma v. Eaves, reviewing its decision in the Knox Co. case, 21 How. say, the decision there was rested *on two grounds*; one of them was, as we understand the case, "the reasonable presumption that the township officers discharged their duty in issuing the bonds." 2 Otto, p. 490.

We understand these "presumptions" to arise in favor of innocent holders of bonds issued *since* the adoption of the constitution of 1870, the same as in favor of those issued before its adoption, the only exception being that where they have issued since, the burden rests upon the party alleging the validity of bonds to show affirmatively they were authorized by a vote of the municipality, under existing laws, prior to the adoption of the constitution. But we have before shown plaintiff was relieved of his burden of proof by the admission in the pleas that there was a vote of the town on the 20th September, 1869, authorizing the issue, and under a certain law referred to by title and date. Transcript of Rec., p. 6.

If presumptions will be indulged, in favor of a bona fide holder, that statutory conditions have been performed, from the mere issue of the bonds, then certainly, upon principle, they ought to be indulged in favor of the same party, that conditions *imposed by the town itself* have been performed.

Again, the people of the town imposed conditions upon their supervisor as to *when* he should issue the bonds; the same authority had the right to waive the condition.

Randolph Co. v. Post, 3 Otto, 502.

Is it not apparent from the allegations in the 2d plea that these restrictions were waived? Page 7 of T. It is there said that *just before* the issuance of the bonds, it became rumored in the town of Brooklyn that the company were going to divert the

route of the road, and thereupon the agents and representatives of the road were notified that if the road was not to be built as promised, that the town would not issue and deliver the bonds and coupons. And thereupon said agents and representatives *informed said town of Brooklyn and citizens thereof*, that said company would not abandon the route, etc., *and thereupon* the supervisor and town clerk, relying upon said representations, issued and delivered said bonds and coupons. The plea then proceeds to allege that the road was immediately abandoned, and that these pledges of the officers, made to get the bonds issued, were false and fraudulent, and so known to be at the time to them; but the falsity thereof was unknown at the time *to the said town of Brooklyn* and to the supervisor and clerk.

Do not these allegations in the pleas contain the implied admission that the *town* of *Brooklyn, and the citizens thereof, consented* to the issue of the bonds and coupons *before* the road was built, upon these new assurances of the officers and agents of the road?

The pleas very distinctly intimate that the citizens of the town, and its supervisor, were acting *together* in taking these reassurances from the road agents and officers, and were together deceived, but did not find it out until they had let the bonds go upon the market. They cannot now be allowed to visit the consequences of this fraud and loss upon the innocent purchasers of their bonds. Johnson vs. County of Stark, 24 Ill. p. 91.

Rogers vs. Burlington, 3 Wall. p. 667.

St. Joseph Township vs. Rogers, 16 Wall. p. 667.

The cases of Middleport vs. Treasurer of Iroquois Co., and Jackson Co. vs. Bush, do not announce a doctrine conflicting with these presumptions in favor of a *bona fide* holder, except to the extent of requiring proof, of what these pleas admit, viz.:

that the bonds were authorized by a vote under existing laws prior to July 2nd, 1870.

In the 2nd plea, at bottom of p. 6 of Transcript, plaintiff in error alleges distinctly, *the facts relied on*, which avoid the bonds, viz.: "that said Railroad Co. had not, at the time said pretended "bonds were issued, *complied with the condition in said notices of* "*election and subscription*, * * conditions precedent to their "issue."

Had these been *statutory* conditions precedent, then the purchaser would have had to have taken notice of them, but the pleas admit distinctly the performance of every *statutory* requirement, and rely solely upon the non-observance by the supervisor of the condition, outside of the statute, imposed by the town itself.

The pleas, in admitting the performance of these statutory requirements, one after another, seek to dodge the effect thereof by prefacing them all with the word "pretended;" and coupling with the admission the allegation that the vote and subscription conferred no power, *because* the supervisor afterwards disregarded these *town-imposed restrictions* to his issuing the bonds.

In our judgment, these things stand distinctly by themselves, though coupled together in pleading for the obvious purposes stated.

If the Court is informed by the pleas that there was a vote prior to July 2nd, 1870, under an existing law authorizing it, that it resulted in favor of issuing the bonds, and subscribing for the stock, and that the supervisor subsequently, under a provision of the act which made it his duty, issued the bonds in exchange for the stock, then we think the law is, that the further statement, contained in the pleas, that these other con-

ditions were not observed, constitutes no defence to the town as against the bona fide holder.

We insist further, upon authority, that as the pleas disclose that the town received stock for the bonds, which it still retains, this is ground of estoppel sufficient to exclude these defences.

Pendleton Co. v. Amy.

In Pendleton Co. case, as well as this case, the bonds were issued *since* July 2, '70, and both issues being Illinois bonds, make the cases analagous on the question of estoppel, and the application of the constitutional provision referred to by opposing counsel. The cases, too, are analagous in another respect: In the Pendleton County case, there was no other grounds of estoppel than this retention of the stock, no recitals, no payment of interest, and yet it was there held that the third plea which alleged want of authority to issue because the conditions precedent had not been performed, could not be sustained, because it *conceded* that stock had been received and was still held by the county.

Pendleton Co. vs. Amy, 13 Wall. p. 305.

On this point the cases are exactly analagous, except that in the Pendleton Co. case, the Declaration alleged the issuance of stock and the plea conceded it, and here the *plea alleges* and *admits* it.

The allegation in 2nd plea, on p. 7 of Transcript, that the stock is worthless, and the town claims no interest in it, is worse than useles, since there is no allegation that it was ever tendered back, or that the supervisor did not on behalf of the town receive it, and hold it, without objection from the town or its citizens until this litigation.

It occurs to us that another ground of estoppel is conceded by the pleas, viz.; laches on the part of the town, its citizens,

and officers, in not enjoining the issue of the bonds, and the receipt of the stock by the supervisor.

The Law of Municipal Bonds. Dillon, p. 52.

No one can read the allegations of the 2nd plea on p. 7 of Transcript, without being convinced that the *citizens* of the town knew of, and were a party to, the parley with the railroad, wherein reassurances were given the "*said town of Brooklyn and the citizens thereof*, that the road would be built, *and thereupon*, the plea says, the supervisor and clerk issued the bonds and coupons.

While we concede, that most of the decisions cited by plaintiff in error, were where the doctrine of estoppel was applied by reason of recitals in the bonds, yet we submit that the decisions of this Court have gone further, and applied the doctrine where laches, and payment of interest, and retention of stock, was the only estoppel. Notably this case of Pendleton Co. vs. Amy.

In the Pendleton Co. case *every plea*, and consequently all their defences, were demurred to, and the case was remanded for trial on the question whether plaintiff below was the owner or bearer of the bonds; but the 3d plea, which denied the authority to issue, neutralized itself by conceding this one ground of estoppel.

In the case at bar, this ground of estoppel is admitted by the pleas, and the other question of ownership was tried, so that the same reasons do not exist for reversal in this case as in that, but just the reverse.

We submit that the numerous authorities cited by plaintiff in error in support of the doctrine as stated on page 10 of its "brief, to wit.: that a want of authority to issue bonds is fatal to "their validity, even though held by innocent purchasers for "value," are all cases where the "*statutory power*" was in ques-

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tion, and where it was held there existed *no law* to authorize the issue. This was the question in the cases of

Marshall & Wiley v. Sillman, 61–62 Ill.

Elmwood v. Marcy, 92 U. S.

Barnes v. Lacon, 84 Ill.

East Oakland v. Skinner, 94 U. S.

and all the other cases cited.

It was not a question like the one at bar, where ample *statutory power* exists, and where it was exercised by a vote, but only irregularly executed by the supervisor issuing the bonds before the railroad had complied with its promises to the town.

An authority more in point is Cromwell v. Sac County, 95 U. S., 51, of this court, where it is said, A bona fide purchaser of negotiable paper for value, before due, takes it *freed from all infirmities in its origin*; the only exceptions being where the paper is absolutely void *for want of power* in the maker to issue it. * * * Municipal bonds, payable to bearer, are negotiable instruments and subject to the same rules as other negotiable paper.

The 4th plea avers that the supervisor and clerk issued and delivered the bonds and coupons without the authority of the *board of auditors*, and of the corporate authorities. We have shown already that the statute made it the *duty* of the supervisor, upon a favorable vote, to issue and deliver the bonds, and receive, in exchange, stock. The board of auditors are not a factor in the case—had nothing to do with it. And as to its being done without the corporate authorities, we have shown that a majority of the voters, by the admission of the pleas, voted for their issue. Page 6 of Transcript.

The 5th plea discloses that the owners of these bonds were

brought into court as unknown owners and holders, by publication.

That their rights cannot be adjudicated or affected in this manner, is sufficiently answered in the case of

Neff v. Pennoyer, 95 U. S., p. 714.

Respectfully submitted by

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